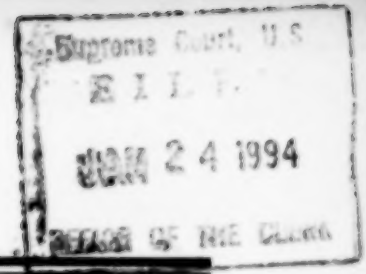


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No. 93-517



IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,
Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

On Writ of Certiorari to the
New York Court of Appeals

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a statute that creates a public school district in order to educate disabled children, with boundaries that are coterminous with a lawfully incorporated municipality whose residents all share a common religious faith, is unconstitutional on its face, regardless of how it is administered, on the ground that such statute has the "primary effect" of advancing religion within the meaning of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2. Whether *Lemon* and the "primary effect" test should be overruled and replaced with a standard that permits a State to enact legislation addressing the secular needs of a community sharing a common religious faith.

LIST OF PARTIES

The Board of Education of the Monroe-Woodbury Central School District was an appellant below and is also a separate petitioner before this Court (No. 93-527).

The Attorney General of the State of New York appeared below in support of appellants and the constitutionality of Chapter 748 of the Laws of 1989 pursuant to New York Executive Law § 71. The Attorney General is also a separate petitioner before this Court (No. 93-539).

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority, concurring and dissenting opinions of the New York Court of Appeals (Pet. App. 1a-60a) are reported at 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94. The majority and dissenting opinions of the Appellate Division, Third Department (Pet. App. 61a-91a) are reported at 187 A.D.2d 16, 592 N.Y.S.2d 123. The opinion of the Supreme Court, Albany County (Pet. App. 92a-101a) is reported at 151 Misc. 2d 60, 579 N.Y.S.2d 1004.

JURISDICTION

The judgment of the New York Court of Appeals was entered on July 6, 1993. On July 26, 1993, this Court stayed the decision of the New York Court of Appeals pending the filing and disposition of a petition for a writ of certiorari. The petition for a writ of certiorari was filed on September 30, 1993, and was granted on November 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

2. Chapter 748 of the Laws of 1989 (entitled "AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county") provides:

Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of

Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

STATEMENT OF THE CASE

This case involves the constitutionality of a New York State statute creating a union free school district to provide a totally secular public educational program to children living in the lawfully incorporated Village of Kiryas Joel. Despite the absence of any allegation or evidence that the legislation has been used to inculcate religious doctrine or to convey religious teaching, the courts below concluded that the statute was an unconstitutional establishment of religion that had the primary effect of advancing the religious faith of the people living in the Village and the coterminous school district.

1. The Village of Kiryas Joel Is Formed.

The Village of Kiryas Joel is located in Orange County, New York. At present, virtually all residents of the Village are Satmar Hasidic Jews — devoutly religious people who reside in an insular community where religious ritual is scrupulously followed, where Yiddish, rather than English, is frequently spoken, where distinctive dress and appearance are the norm, where television is excluded, and where — in general — children receive their education in private boys' and girls' religious schools rather than in secular public schools.

The land making up the Village is privately owned and not held by any religious institution or entity. The Village's inhabitants have voluntarily chosen to live in geographic

proximity to each other so as to facilitate the exercise of their shared religious beliefs and preserve their unique culture and way of life. Although no one is excluded from the Village on the grounds of race or religion, only members of the Satmar community have, thus far, chosen to live in Kiryas Joel.^{1/}

The approximately 320 acres that is now the Village of Kiryas Joel used to be part of the Town of Monroe. Almost seventeen years ago, the Village was carved out of Monroe and lawfully incorporated pursuant to Article 2 of New York's Village Law. The incorporation followed the procedures of New York law, beginning with a petition presented in September 1976 (3 R. 530-589),^{2/} through appropriate public notifications and a public hearing (J.A. 8).

In approving the petition, the Supervisor of the Town of Monroe discussed at some length the zoning disputes

^{1/} The plaintiffs have argued throughout this litigation that the Satmar faith includes "separatist tenets" requiring that its adherents not mix with persons of other faiths. The record does not support this contention, and it is wrong as a matter of fact. While we have never disputed that the Satmar prefer to live together, they do so to facilitate individual religious observance and maintain social, cultural and religious values, not because it is "against their religion" to interact with others. On the other hand, gender segregation practiced in the private Satmar religious schools is mandated by religious doctrine. There is, however, no gender segregation in the Kiryas Joel public school at issue in this case. Satmar religious observance permits disabled children to participate in co-educational classes.

^{2/} "3 R. ____" refers to the printed three-volume record filed in the New York Court of Appeals. "J.A. ____" refers to the Joint Appendix. "Pet. App. ____" refers to the Appendix to our Petition for a Writ of Certiorari. "M.W. Pet. App. ____" refers to the Appendix to the Petition for a Writ of Certiorari in No. 93-527. "A.G. Pet. App. ____" refers to the Appendix to the Petition for a Writ of Certiorari in No. 93-539.

between the Town of Monroe and the Satmar Hasidic residents of the Monwood subdivision that led to the separate incorporation of the Village of Kiryas Joel. The Supervisor explained that "the Satmar believe in large, close knit family units and sociological groups and are accustomed to a highly dense urban form of living, having for the most part been residents of the Borough of Brooklyn in the City of New York since the end of World War II" (J.A. 10), and he expressed the view that the Satmar opposition to Monroe's zoning enforcement was based on "economic reality" — the greater affordability of higher-density construction (J.A. 11). Incorporation would "allow the Satmars to enact their own zoning laws designed to suit their economic and sociological needs" (J.A. 12). The Supervisor concluded that the petition was legally sufficient and approved it (J.A. 15-16).

Following this approval, a referendum on incorporation of the Village was passed overwhelmingly (3 R. 529). Incorporation papers were filed with the Department of State and a Certificate of Incorporation of the Village was issued on March 2, 1977 (3 R. 527). Since that time, the Village of Kiryas Joel has operated as a lawful municipality pursuant to New York's Village Law and the Code of the Village of Kiryas Joel, New York, the latter governing such areas of municipal concern as Flood Damage Prevention (Chapter 77), Noise (Chapter 92), Sewers (Chapter 114), Swimming Pools (Chapter 127), and Taxicabs (Chapter 134).

2. Education of Disabled Children Becomes an Issue.

Before passage of Chapter 748 in 1989, the Village of Kiryas Joel was under the jurisdiction of petitioner Monroe-Woodbury Central School District ("Monroe-Woodbury"). The non-disabled children of the Village all attended private religious schools in Kiryas Joel. Federal and state law

required, however, that Monroe-Woodbury provide a "free appropriate public education" to all children within its jurisdiction needing special education services (20 U.S.C. §§ 1400(c), 1401(a)(18), 1412; New York Education Law § 4401 *et seq.*; 8 NYCRR § 200 *et seq.*).

Prior to this Court's 5-to-4 decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), the disabled children of Kiryas Joel received education services from Monroe-Woodbury public-school personnel in an annex to one of the religious schools. Affidavit of Jay Worona, ¶ 35 (2 R. 414). When that program was terminated because of the *Aguilar* decision, some Satmar parents enrolled their disabled children in classes in the Monroe-Woodbury public schools. *Id.* at ¶¶ 36-38 (2 R. 414-415).

Disputes quickly arose, however, over the educational services provided at Monroe-Woodbury. The Kiryas Joel parents contended that Monroe-Woodbury was not meeting "the need of many of the children for one-on-one services." *See Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, 181, 531 N.Y.S.2d 889, 892 (1988). Issues were also raised concerning whether Monroe-Woodbury was adequately meeting the unique language needs of the Satmar children. Affidavit of Abraham Wieder, ¶ 6 (A.G. Pet. App. 127a). The Kiryas Joel parents found, moreover, that their disabled children were traumatized by their experiences in attending the Monroe-Woodbury schools outside the Village. Affidavit of Hannah Flegenheimer, ¶ 15 (J.A. 88) (majority of parents "kept their children out of the public schools to avoid the trauma they believed the children would suffer because of their cultural uniqueness"). *See also Wieder*, 72 N.Y.2d at 181, 531 N.Y.S.2d at 892 (noting parents' claims of "panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were

so different from theirs," including claims of specific instances of "anxiety and distress" experienced by children in Monroe-Woodbury public schools).

Monroe-Woodbury nevertheless refused to provide services for the disabled Satmar children at any site other than the regular public schools located outside Kiryas Joel. Affidavit of Jay Worona, ¶ 37 (2 R. 415). The Kiryas Joel parents took the position that Monroe-Woodbury's insistence that their disabled children receive services in a "foreign setting designed for the language and culture of the majority population" would have a "major adverse effect on their educational progress," thus denying them the education to which they were legally entitled. Affidavit of Abraham Wieder, ¶¶ 6, 7 (A.G. Pet. App. 127a). Some parents sought administrative review of the appropriateness of their children's recommended placement under federal and state law. Affidavit of Jay Worona, ¶ 40 (2 R. 415).

In 1985, during the pendency of those administrative claims, Monroe-Woodbury initiated a lawsuit in state court requesting a declaratory judgment that it lacked statutory authority to provide the special education services anywhere other than the regular public schools located outside the Village. The Satmar parents counterclaimed, arguing that Monroe-Woodbury had to provide the services at a "neutral site" in the Village. The New York Court of Appeals ultimately ruled that neither side was correct, but, citing this Court's decision in *Volman v. Walter*, 433 U.S. 229 (1977), observed that "[i]t may well be that certain of the services in controversy could be furnished to [the Satmar children] at neutral sites if [Monroe-Woodbury] determined to do so." *Wieder*, 72 N.Y.2d at 189 n.3, 531 N.Y.S.2d at 897 n.3. In rejecting the parents' Free Exercise claim to education at a neutral site, the *Wieder* court explicitly concluded that "the

emotional impact on the children of traveling out of Kiryas Joel" alleged by the parents was a "nonreligious reason" for keeping the disabled Satmar children out of the Monroe-Woodbury schools. 72 N.Y.2d at 189, 531 N.Y.S.2d at 897.

3. Chapter 748 Is Introduced To Resolve the Conflict.

Following the *Wieder* decision in 1988, Monroe-Woodbury continued to refuse to provide the required special education services at a location within the Village. The New York Legislature then passed Chapter 748 of the Laws of 1989, declaring that the Village of Kiryas Joel "shall be and hereby is constituted a separate school district . . . and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law." It is not disputed that the statute was enacted to address the impasse that resulted following the Court of Appeals' decision in the *Wieder* case. The Assembly sponsor explained in a letter to Governor Cuomo that the legislation "ends years of legal battles" between the Monroe-Woodbury Central School District and the residents of the village of Kiryas Joel over providing state-funded education to disabled Hasidic children. Observing that the Hasidic community would not compromise its religious tenets, he added, "With the enactment of this legislation, bureaucratic entanglements that have prevented the delivery of special education programs to the hasidic kids of the village of Kiryas Joel will end" (J.A. 19). ^{3/}

^{3/} Legislation carving out a union free school district to facilitate the provision of public education to a particular group of students with special needs is common. As acknowledged in the Second Amended Complaint (J.A. 62), approximately twenty school districts have been created by special act of the Legislature. These districts are generally coterminous with private institutions serving disabled or emotionally disturbed children (J.A. 62; 1 R. 92-95). The statutes creating these districts provide for boards of education elected by the boards of the private institutions (*id.*),

4. Chapter 748 Is Debated.

The legislation was supported by a unanimous vote of the Monroe-Woodbury Board of Education (J.A. 17-18), which sent a letter to Governor Cuomo urging him to sign the bill because "it will allow for the proper education of the Kiryas Joel handicapped children" (J.A. 22). Monroe-Woodbury also argued to the governor that it was not appropriate that it should have within its borders an incorporated village with a parochial school population that eventually would be several times larger than the public school population of the district (J.A. 22). ^{4/} Monroe-Woodbury urged the governor that "[t]he creation of a separate school district will serve to reduce community tension and lead to productive relationships" (J.A. 22). Orange County also wrote to the governor urging passage of Chapter 748 (3 R. 691). The American Jewish Congress acknowledged in its letter to the governor opposing the bill that the legislation would free Monroe-Woodbury "of a segment of the community with every reason to oppose increased funding and taxes for the public schools and which can vote as a bloc to enforce its wishes" (3 R. 682).

some of which are owned by religious denominations. See, e.g., Chapter 744 of the Laws of 1973 (designating territory "owned by the Missionary Sisters of the Sacred Heart, a religious corporation" as a union free school district under the control of a board of education "elected by the board of directors or trustees of the St. Cabrini Home, Inc., a religious corporation"); Chapter 987 of the Laws of 1972 (designating the Pius XII School as the Sugarloaf Union Free School District).

^{4/} The population of the Village of Kiryas Joel has expanded rapidly since the initial formation of the Village, in part because of the large number of children — as many as ten or twelve — in a typical Satmar family.

The bill was also viewed by at least one legislator who voted for it as ensuring that "students will not have to sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the State" (J.A. 39). He characterized the bill as one of "many measures seeking to reasonably adjust standard societal practices in order to permit the full participation of religious minorities in the life of our State" (J.A. 39). The State Education Department opposed the bill in part because of its understanding that "the State would be accommodating the religious beliefs of a particular religious sect by enacting legislation that furthers its decision to insulate the children of the village from the larger society" (J.A. 28-29).

5. Governor Cuomo Signs Chapter 748.

On July 24, 1989, Governor Cuomo approved Chapter 748. In his approval memorandum, the governor stated, "My Counsel . . . advises that the bill is, on its face, constitutional. I am persuaded by my Counsel's view" (J.A. 40). The governor characterized the bill as "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect" (J.A. 40-41). He recounted the history of the dispute over special education services, noting specifically that, under Supreme Court precedent, such services may be provided at a "neutral site" but that Monroe-Woodbury had refused to do so. The approval memorandum concluded (J.A. 41):

I believe that this bill is a good faith effort to solve this unique problem. And, as noted above, I am advised it is facially constitutional. Of course this new school district must take pains to avoid conduct that violates the

separation of church and state because then a constitutional problem would arise in the application of this law. The village officials acknowledge this responsibility. I believe they will be true to their commitment.

6. The School District Goes To Work.

A seven-member board of education was elected. On July 1, 1990, as provided in the statute, the Kiryas Joel Village School District officially became operational. Since that time, the district has been an unqualified success. No challenge has been made to Chapter 748 as applied.

The district's one school is currently providing totally secular special education services to approximately 200 children with disabilities such as "mental retardation, deafness, speech and language impairments, emotional disorders, learning disabilities, Down's syndrome, spina bifida and cerebral palsy" (*Wieder*, 72 N.Y.2d at 179, 531 N.Y.S.2d at 891). The district's Superintendent is not Hasidic. Affidavit of Steven M. Benardo, ¶ 8 (M.W. Pet. App. 117a). He served for twenty years in the New York City public school system, where he gained expertise in the highly specialized area of bilingual-bicultural special education. *Id.* at ¶¶ 3-6 (M.W. Pet. App. 115a-116a). The teachers and therapists, all of whom live outside the Village, teach a secular curriculum of subjects such as reading, writing, arithmetic, music and physical education to mixed classes of boys and girls, using English as the primary language of instruction. *Id.* at ¶¶ 9-17 (M.W. Pet. App. 117a-119a). This secular education is totally different from the religious indoctrination provided in the gender-segregated private religious schools located in Kiryas Joel.

7. A Constitutional Challenge Is Initiated.

In January 1990, approximately half a year before the School District began its operations, the New York State School Boards Association ("NYSSBA") and respondents Grumet and Hawk, acting both in their representative capacities as officers of NYSSBA and individually, brought this action against the State Education Department and various state officials, challenging Chapter 748 as, *inter alia*, facially invalid under the Establishment Clause of the United States Constitution and Article XI, § 3, of the New York State Constitution (the so-called "Blaine Amendment").

With respect to the Establishment Clause claim, the plaintiffs alleged that Chapter 748 had the purpose and primary effect of promoting religion because the State of New York was "accommodating the religious beliefs of a particular religious sect." Second Amended Complaint, ¶ 84 (J.A. 68). In particular, the plaintiffs contended that the law "furthers the Hasidim's centrally held religious belief of insulating the children of the Village from the larger, diverse outside society" and "therefore has as its purpose, and/or will have as its primary effect, the promotion of religion." *Id.* The plaintiffs also alleged that Chapter 748 would cause state officials to become excessively entangled with matters of religion. *Id.* at ¶ 85 (J.A. 68). The plaintiffs concluded that because enactment of the statute "follow[ed]" the New York Court of Appeals' decision in the *Wieder* case and this Court's decisions in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985), "the unconstitutional intent of the legislation is apparent." Second Amended Complaint, ¶ 86 (J.A. 68).

8. The Trial Court Agrees with the Plaintiffs.

The trial court granted motions by the Kiryas Joel Village School District and the Monroe-Woodbury Central School District to intervene as party defendants (2 R. 300-304). A stipulation was subsequently entered discontinuing the action as against the State Education Department and state officials, but providing that the New York Attorney General would continue to appear in the action in support of the constitutionality of the statute pursuant to New York Executive Law § 71 (2 R. 395-397). There was no discovery or other factual inquiry. On cross-motions for summary judgment, the Supreme Court, Albany County, held that Chapter 748 violated all three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and was therefore facially unconstitutional under both the federal and state constitutions (Pet. App. 92a-101a).

9. A Divided Appellate Division Affirms.

The Appellate Division, Third Department, affirmed that decision over a dissent by Justice (now Judge) Levine,^{2/} on the ground that Chapter 748 had the primary effect of advancing religion and therefore violated both the federal and state constitutions (Pet. App. 61a-91a). The Appellate Division majority reasoned that because "religion played a role in the dispute" between the Kiryas Joel parents and Monroe-Woodbury (Pet. App. 71a), the creation of a school district coterminous with the Village of Kiryas Joel to resolve that dispute created a "symbolic union between church and state" that "is significantly likely to be perceived by adherents of the Satmarer Hasidim as an endorsement, and by

^{2/} On August 12, 1993, Justice Levine was nominated by the Governor to the New York Court of Appeals. He was confirmed on September 7, 1993.

nonadherents as a disapproval, of their individual religious beliefs" (Pet. App. 70a). ^{9/}

Justice Levine's dissent concluded that Chapter 748 on its face passes all three prongs of the *Lemon* test. Justice Levine found that the reason given by the Satmar parents for not using the Monroe-Woodbury facilities was secular, not religious (Pet. App. 77a-78a). He also concluded that, even assuming the Satmar parents had declined to send their children to school outside of the Village for religious reasons, the State's accommodation of their religious beliefs did not have the primary effect of advancing religion (Pet. App. 84a-88a). ^{1/}

10. A Divided Court of Appeals Affirms.

The New York Court of Appeals, by a 4-to-2 vote, affirmed the Appellate Division's conclusion that Chapter 748 violates *Lemon's* "primary effect" prong. The court modified the Appellate Division decision, however, to the extent that it relied on the New York State Constitution in striking down Chapter 748 (Pet. App. 16a-17a).

The majority reasoned that Chapter 748 has the primary effect of advancing religion because "the statute not only authorizes a religious community to dictate where secular

^{9/} "Satmar" is the name of the Hungarian village where this particular community originated (14 *Encyclopedia Judaica* 908-09 (1971)) and is also an adjective that describes the community and the Hasidim.

^{1/} The Appellate Division also ruled that NYSSBA and its officers, in their capacity as representatives of NYSSBA, lacked standing to challenge the constitutionality of Chapter 748 (Pet. App. 64a-65a), leaving only Messrs. Grumet and Hawk in their individual capacities as plaintiffs. The Court of Appeals denied leave to appeal this issue (3 R. 808).

public educational services shall be provided to the children of the community, but also 'creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test'" (Pet. App. 12a, quoting Pet. App. 68a). The majority relied on its conclusion that "only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board" (Pet. App. 12a).

The dissent by Judge Bellacosa (joined by Judge Titone) found that any "incidental, 'attenuated' benefit to the minority Satmar viewpoint supports this State's rich pluralistic tradition and does not diminish, but rather enhances, the common good" (Pet. App. 51a). Judge Bellacosa reasoned that "the establishment of a union free school district geographically identical to an incorporated municipality, in the context of the constitutional and statutory guarantees of public education, neutral religious rights and nondiscrimination provided by both Federal and State law, should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominantly or even exclusively members of that denomination" (Pet. App. 56a).

11. This Court Stays the Decision.

On July 26, 1993, this Court issued an order staying the judgment of the Court of Appeals pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Petitions for a writ of certiorari were timely filed by the Board of Education of the Kiryas Joel Village School District, the Board of Education of the Monroe-Woodbury Central School District, and the Attorney General of the State of New York, and on November 29, 1993, the Court granted the petitions and consolidated the three cases for argument.

INTRODUCTION AND SUMMARY OF ARGUMENT

The New York Legislature has authorized the Village of Kiryas Joel, a municipality presently inhabited entirely by individuals who have voluntarily chosen to live together to preserve a distinctive religious way of life, to provide and administer wholly secular public educational services. The New York courts have held that this legislative judgment is barred by the Establishment Clause of the First Amendment because everyone who lives in Kiryas Joel today is a devoutly Orthodox Jew. If the population of Kiryas Joel consisted only of atheists, or vegetarians, or Republicans, or persons of Scandinavian ancestry, no one would question the authority of the New York Legislature to recognize the Village as a separate public school district.

We contend that religious observance is not so disfavored by the Constitution that those who practice it devoutly and distinctively must forfeit the opportunity, available to everyone else, to provide and administer secular public services. Indeed, no one seems to question the power of the present Village, acting through duly elected officials (all of whom are necessarily Satmar Hasidim), to provide police services, fire protection, trash disposal or any other standard municipal service to a Village population consisting entirely of Satmar Hasidim. Public education is, we submit, no different.

Reversal of the decision of the New York courts is required on several alternative grounds. *First*, this is a facial challenge to Chapter 748, and this Court has prescribed severe hurdles for claims that a statute is unconstitutional on its face. Only if the law cannot, under any circumstances, be constitutionally executed may it be invalidated on its face. Chapter 748 delineates a geographical area — a municipality in which homes are individually owned — as a public school

district. No matter what the current composition of the area's population may be, it cannot be said that the law, on its face, is forever incapable of constitutional application. Moreover, even if all the residents of the municipality remain Satmar Hasidim, there is no reason to believe that secular education services authorized by law cannot be provided in a wholly nonsectarian manner by public officials who are religiously devout.

Second, the constitutional standards prescribed by the decisions of this Court after *Lemon v. Kurtzman*, 403 U.S. 602 (1971), are met in this case. No public funds or publicly provided facilities are utilized by Chapter 748 for the communication or advancement of any religious message. The law has an obvious secular purpose — to provide suitable secular special education for the disabled children of the Village. Nor does it have a "primary effect" of advancing religion because there is no enduring "symbolic union" between church and state. And, even at the moment when it was enacted, the law gave no impermissible added benefit to Satmar Hasidim because the Satmar children were not previously receiving *appropriate* special education services at the Monroe-Woodbury public schools. The legislative creation of the Kiryas Joel Village School District is, in substance, no different from providing the needed services at a "neutral site."

The fact that the elected school board for Kiryas Joel consists of Satmar Hasidim does not constitutionally disqualify it from providing governmental services. *McDaniel v. Pate*, 435 U.S. 618 (1978). Nor does the religious homogeneity of the student body make it ineligible to receive secular public services. *Wolman v. Walter*, 433 U.S. 229 (1977). Under the "endorsement" standard articulated by Justice O'Connor in recent Establishment Clause cases and the "coercion" standard

expressed by Justice Kennedy, Chapter 748 passes constitutional muster.

At most, Chapter 748 accommodates the religious observances of Satmar Hasidim by enabling their disabled children to receive special education in the familiar surroundings of their own Village where they can more readily adhere to their religious way of life. If this amounts to an adjustment of public services to facilitate private religious devotion, it is not forbidden by the Establishment Clause. The "best of our traditions" includes accommodation of the religious beliefs of all Americans.

Finally, to the extent that the *Lemon v. Kurtzman* standards could justify a judicial decision invalidating Chapter 748, those standards should be formally and definitively overruled. A majority of the Justices have indicated their dissatisfaction with the three-pronged *Lemon* test, and, rather than guiding lower courts towards a consistent body of constitutional law, it has engendered confusion, uncertainty, and divergence of judicial opinion. This case should be governed by the rule that legislation designed to accommodate to the observances of a religious group and promote the free exercise of religion is constitutionally valid so long as it does not pay with public funds for any religious activity and does not coerce religious observance or nonobservance.

ARGUMENT

I.

THE PRINCIPLES APPLIED IN *BOWEN v. KENDRICK* GOVERN THIS FACIAL CHALLENGE TO CHAPTER 748

The dispute that the plaintiffs asked New York's courts to resolve is their challenge to Chapter 748 on its face. They do not contend — and the courts below did not find — that the law creating a public school district for the Village of Kiryas Joel has been unconstitutionally administered to provide impermissible aid to religion. The sole claim presented by the plaintiffs to the lower courts and preserved for decision by this Court is that the statute is invalid regardless of how pristinely it may be carried out by the Kiryas Joel Village School Board.

The majorities of New York's appellate courts and its trial court all ignored the principles that this Court articulated and applied in *Bowen v. Kendrick*, 487 U.S. 589 (1988), which concerned a federal grant program that authorized participation by religious institutions. This Court acknowledged in *Bowen v. Kendrick* that administration of the grant program by sectarian organizations *could* give rise to Establishment Clause violations. But the Court held that it should not be presumed, in a facial challenge to the law, that such violations would, in fact, occur. 487 U.S. at 610-15.

In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984), this Court said that a "holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner." The same standard was applied in *United States v. Salerno*, 481 U.S.

739, 745 (1987), in which this Court stated that a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." See also *Reno v. Flores*, 113 S. Ct. 1439, 1446 (1993); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("A 'facial' challenge, in this context, means a claim that the law is 'invalid *in toto* — and therefore incapable of any valid application.'").

In this case, of course, the statute on its face makes no reference to religion. Rather, Chapter 748 sets up a school district that is defined *geographically*. The new school district is made up of "[t]he territory of the village of Kiryas Joel in the town of Monroe, Orange county." The New York Court of Appeals, however, referred to the new school district as being "coterminous with the Satmarer Hasidic community of Kiryas Joel" (Pet. App. 6a) and relied on the assumption that "only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board" (Pet. App. 12a). Although the Village of Kiryas Joel is a community which is inhabited at present solely by adherents to one faith, no one is excluded from the Village on the grounds of race or religion. The school district created by Chapter 748 will continue to have responsibility for public education within the territory making up the Village of Kiryas Joel, regardless of who lives in that territory. In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court indicated that current conditions are of limited utility in determining whether a state statute is facially invalid under the Establishment Clause. The Court said, "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. at 401.

Moreover, even if it be assumed, *arguendo*, that the Village will forever be inhabited exclusively by Satmar Hasidim, Chapter 748 would not be constitutionally invalid on its face. Just as this Court upheld the federal Adolescent Family Life Act against a facial challenge in *Bowen v. Kendrick* because the face of the law did not indicate that "pervasively sectarian" institutions would be given a significant proportion of the allocated federal funds (487 U.S. at 610-11) and there was no basis for a "presumption" that religiously affiliated grantees would be unable to carry out their functions "in a lawful, secular manner" (487 U.S. at 612), there is no basis in this case for assuming that Chapter 748 will be implemented by "pervasively sectarian" administrators or in a "pervasively sectarian" manner. If there are any aspects of the new school district's operations that step across the permissible boundary line between the secular and the religious, they may be challenged in an "as applied" lawsuit. They do not justify eradicating Chapter 748 on its face.

II.

CHAPTER 748 PASSES CONSTITUTIONAL MUSTER UNDER THE THREE-PART TEST OF *LEMON v. KURTZMAN*

For purposes of this portion of our argument, we will assume, *arguendo*, what Chapter 748 does not prescribe on its face — *i.e.*, that all (or substantially all) its beneficiaries are devoutly Orthodox Jews whose religious observance is facilitated by the existence of a public school that provides secular educational facilities for their disabled children in their own village. We also assume, *arguendo*, that in the implementation of Chapter 748 the school board will consist entirely of popularly elected Satmar Hasidim. The

constitutional issue is whether the religious character of the students, or the religious ideology of the probable school board, constitutionally disqualifies the Kiryas Joel Village School District.

The majorities in both of the appellate courts below held that because of the nature of Kiryas Joel's population, a "symbolic union" between church and state was created when the New York legislature created a public school district co-extensive with its boundaries. But decisions of this Court establish that there is no constitutional violation simply because religious and secular interests coincide. The Constitution is not violated if God smiles on Caesar's handiwork.

A. Chapter 748 Does Not Sponsor or Communicate Any Religious Message or Provide Financial Support for Any Religious Group.

We emphasize, at the outset, two important factual considerations. *First*, the challenged law does not pay for or provide any religious teaching or indoctrination whatever. It is a law that authorizes *only* secular services. This is, in other words, not a case — as was *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993) — in which the government has provided a "resource capable of advancing a school's religious mission" or "equipment that could be used to convey a religious message." 113 S. Ct. at 2473, 2474 (Blackmun and Souter, JJ., dissenting). The Kiryas Joel Village School District is a public school district that has no "religious mission" and the services that are publicly financed in this case are *entirely* secular.

Second, although the disabled students who are currently receiving assistance under this law are all adherents to the same religious faith, the law does not finance or support a church or other religious institution. It provides secular benefits through a governmental institution — a public school district — to people who happen to be religious. That result does not invalidate the law under this Court's articulated rule that the danger of violating the Establishment Clause in school aid cases grows out of "the nature of the institution, not . . . the nature of the pupils." *Wolman v. Walter*, 433 U.S. 229, 248 (1977).

B. Chapter 748 Has a "Secular Legislative Purpose."

Although the New York Court of Appeals did not discuss¹ the first of the three prongs of the Establishment Clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), we address initially the question whether the challenged statute has "a secular legislative purpose." 403 U.S. at 612-13. It plainly does.

As of 1989, when Chapter 748 was enacted, the vast majority of disabled children of Kiryas Joel were receiving no special education services whatever. Their parents had concluded that the emotional toll on the children of attending the Monroe-Woodbury schools outside the Village outweighed whatever limited educational benefits the children might receive in that program. Nor could the parents afford private tutoring. The dispute over the "appropriateness" of the Monroe-Woodbury services therefore led to an impasse under which the children were getting no education at all. Chapter 748 cut through these "bureaucratic entanglements" and resulted in "the delivery of special education programs to the hasidic kids of the village of Kiryas Joel" (J.A. 19).

That is indisputably a constitutionally adequate "secular legislative purpose." Indeed, in *Lemon v. Kurtzman*, itself, this Court accepted the legislative statement that enhancing the quality of compulsory secular education was the "secular legislative purpose" of reimbursing sectarian schools or teachers in such schools for the expense of secular instruction. 403 U.S. at 613.

And in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court concluded that a statute granting tax deductions to parents for expenses incurred in providing tuition, textbooks, and transportation for their children's schooling "plainly serves [the] secular purpose of ensuring that the State's citizenry is well educated." 463 U.S. at 395. The Court recognized the valid secular purpose for the state statute notwithstanding the absence of any express statement of legislative purpose in the law and the "few unambiguous indications of actual intent" in the legislative history. 463 U.S. at 394-95, n.4. The Court emphasized its "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." 463 U.S. at 394-95.

One judge on the New York Court of Appeals (Hancock, J.) maintained that the first of the three *Lemon* prongs was violated because "Chapter 748 establishes what amounts to a private school to furnish special education services at public expense to the residents of Kiryas Joel in order to accommodate their religiously mandated requirement of separation for their children." Pet. App. 35a. This is a factually erroneous assertion because the school is *not*, by any manner or means, a "private school" and there is no "religiously mandated requirement" that the children be

separated. But, in any event, it misapprehends the "secular legislative purpose" prong of the *Lemon* test.

Even assuming that the Satmar parents' reason for not sending their children to the public schools outside the Village is that the location burdens their religious practice and the legislature intended to lift that burden, such "accommodation" to religious practices is a permissible constitutional objective. In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987), the Court explained that the first prong of *Lemon* does not mean that a "law's purpose must be unrelated to religion." Rather, said the Court, "there is ample room for accommodation of religion under the Establishment Clause" and "government acts with [a] proper purpose" when it lifts a burden on the exercise of religion. 483 U.S. at 338. *See also Wallace v. Jaffree*, 472 U.S. 38, 83 (O'Connor, J., concurring) ("the religious purpose of [a statute designed to accommodate religion] is legitimated by the Free Exercise Clause").

Consequently, even if the purpose of Chapter 748 was to adjust the school district lines to make it possible for secular services to be delivered to the disabled children of the Village near their own residences so as to accommodate the observance of their religion, the statute's "purpose" meets the constitutional standard.

C. Chapter 748 Does Not Have a "Primary Effect" of Advancing Religion.

The second of *Lemon's* tests provides that a statute is constitutional under the Establishment Clause only if "its principal or primary effect . . . neither advances nor inhibits religion." 403 U.S. at 612. New York's appellate courts concluded that Chapter 748, on its face, failed this test

because "the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community, but also 'creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test.'" Pet. App. 12a, quoting Pet. App. 68a. The opinion announcing the judgment of the court below explained that "only Hasidic children will attend the public schools in the newly established school district" and "only members of the Hasidic sect will likely serve on the school board." Pet. App. 12a. This, said Judges Smith and Simons,^{8/} is a "symbolic union of church and state" that "is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices." Consequently, they said, the primary effect of Chapter 748 is "to advance religious beliefs." *Id.*

(1) *The error of the New York courts* — The view of the two judges of the New York Court of Appeals and the four judges on its Appellate Division is that the mere enactment of Chapter 748 created the kind of "symbolic union of church and state" that was found to be constitutionally impermissible in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). But this was a gross distortion of the "primary effect" prong and of the "symbolic union of church and state" interpretation given to that prong in this Court's *Grand Rapids* decision. This Court held in *Grand Rapids* that the "symbolic union" of day-in-day-out instruction by public-school personnel on the premises of a pervasively sectarian parochial school would give "children of tender years" the impression of "a union between church and state." 473 U.S. at 390.

^{8/} Chief Judge Kaye and Judge Hancock concurred in separate opinions.

That continuing "symbolic union" is totally different from the temporary inference of cooperation between church and state on which the majority below relied. Nor is the perception conveyed to adult Satmar Hasidim or to adult "nonadherents" the same as the daily impression of schoolchildren who see, before their eyes, a "symbolic union" in the merged program invalidated in *Grand Rapids*. The fact that the New York Legislature created a public school district to provide secular educational services for a community of religious believers could be viewed as a "symbolic" representation of public policy only during the period when the legislation is new and when its opponents, such as the respondents in this case, keep it in the forefront of public attention. Once the controversy is over, all that remains is a secular public school located in Kiryas Joel, offering a secular education to disabled children. And, unlike the children in *Grand Rapids v. Ball*, the children who attend the public school in Kiryas Joel see only a public school providing a secular education, not "a symbolic union of church and state." The long-range consequence of the challenged law, rather than an erroneous temporary impression created by a dispute over its enactment, governs the "primary effect" prong of *Lemon v. Kurtzman*.

This Court rejected an essentially similar "symbolic link" argument in *Bowen v. Kendrick*, 487 U.S. 589 (1988), noting that acceptance of the "symbolic link" argument would invalidate all government funding to religious organizations "no matter whether the aid was to be used solely for secular purposes." 487 U.S. at 613. The public funding in this case goes exclusively for "secular purposes" and is paid to an official governmental entity, not to a church. There is, therefore, no "symbolic union."

(2) *The alleged availability of similar services* —

The court below said that the primary effect of Chapter 748 was "to yield to the demands of a religious community" because, in its view, "special services are already available to the handicapped children of Kiryas Joel" at the Monroe-Woodbury public school facilities. Pet. App. 15a. This is a misunderstanding of the "primary effect" test and rests on erroneous assumptions regarding what was "available."

The true "principal or primary effect" of Chapter 748 is that approximately 200 disabled children who had not previously been receiving the special education which they should legally have are now receiving a wholly secular education from an ethnically and religiously heterogeneous faculty in a building that has no religious symbols or significance. The parents had long claimed that *appropriate* services had not been provided by Monroe-Woodbury, and some had initiated administrative review of the propriety of recommended placements under federal and state law. While the children could have theoretically obtained an "appropriate" education from Monroe-Woodbury by pursuing such litigation, the effect of Chapter 748 was to cut through the disputes over appropriateness — without taking sides — and get the children educated. It is not unconstitutional for the Legislature to avoid child-by-child adversarial administrative proceedings with an unwilling school district by carving out — with the blessing of that district — a new school district that would be ready, willing and able to provide services that all would consider "appropriate." This statute effected a political compromise, designed to end "years of legal battles" and "bureaucratic entanglements" (J.A. 19), not an advancement of religion.

(3) *The children's secular need* — The fact that the some of the children's special educational needs arose out of their unique cultural and religious upbringing does not make those needs "religious" and does not mean that any statute designed to meet those needs has the "primary effect" of advancing religion. The judges below cited no authority to support the notion that a State is prohibited from acting to alleviate a legitimate secular need — here, for example, the emotional toll on the children of leaving the Village — merely because that secular need is an incidental outgrowth of a way of life molded in part by religious values. If a Hasidic family is poor because its members are unavailable to work on religious holidays or because of religious discrimination, the family's poverty is not a "religious" need, and alleviating it is not an advancement of religion. Likewise, Chapter 748 does not advance the Satmar faith merely because the secular need it met (the children's need to be educated within the Village) would not have existed but for the religion of their parents. A contrary rule would manifest hostility, rather than neutrality, toward religion and "require the 'callous indifference' [this Court has] said was never intended by the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citation omitted).

Moreover, the Court of Appeals' conclusion about the primary effect of Chapter 748 is premised on the mistaken assertion that Satmar Hasidim hold "separatist tenets" requiring that their children not interact with non-Satmar children. As discussed in note 1, *supra*, that assertion is wrong as a matter of fact. The inaccuracy of the Court of Appeals' assumption is demonstrated by the fact that some Satmar parents did, for some period of time after *Aguilar* was decided, send their disabled children to the Monroe-Woodbury public schools. Such attendance would never have been attempted if "separatism" were, indeed, a tenet of Satmar

faith. The decision by the New York Court of Appeals in this case ignores entirely that court's own prior holding in the *Wieder* case that the emotional impact on the children of traveling outside the Village was a "nonreligious reason" for taking the children out of the Monroe-Woodbury public schools.

(4) The "neutral site" analogy — The extreme "effects" approach of the New York Court of Appeals conflicts with this Court's decision in *Wolman v. Walter*, 433 U.S. 229 (1977). In that case, this Court considered various forms of "state aid to pupils in church-related elementary and secondary schools" (433 U.S. at 232) and concluded that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion" (433 U.S. at 248). To be sure, providing such services to parochial school students at a neutral site has the effect of accommodating parents who want, for religious reasons, to send their children to a sectarian school. Yet this Court has concluded that this practice does not violate the Establishment Clause. The school operated by the Kiryas Joel Village School District is analogous to such a neutral site. Indeed, it is more clearly permissible. It is not just a public school outpost operated near a parochial school by public school personnel, but is itself a public school.

Moreover, the *Wolman* Court found no constitutional infirmity arising from the "fact that a unit on a neutral site may . . . serve only sectarian pupils" because the dangers to be avoided by the Establishment Clause arise "from the nature of the institution, not from the nature of the pupils." 433 U.S. at 247-48. See also *School District of Grand Rapids v. Ball*, 473 U.S. 373, 391 & n.10 (1985) (reaffirming *Wolman* and the "neutral site" rule); *Aguilar v. Felton*, 473 U.S. 402,

426 (1985) (O'Connor, J., dissenting) ("Our Establishment Clause decisions have not barred remedial assistance to parochial school children, but rather remedial assistance on the premises of the parochial school.") (emphasis omitted). This distinction renders irrelevant the consideration on which the New York Court of Appeals relied heavily — *i.e.*, that "only Hasidic children will attend the public schools in the newly established school district" (Pet. App. 12a).

(5) The "strict scrutiny" or "overbreadth" test — Chief Judge Kaye of the court below invoked an inapplicable constitutional standard that, in her view, invalidated Chapter 748. She maintained that the law had to be "strictly scrutinized, because it provides a particular religious sect with an extraordinary benefit: its own public school system." Pet. App. 18a. Although she assumed that providing a suitable education to disabled children is a "compelling governmental interest" (*id.*), she found that Chapter 748 was not "narrowly-tailored legislation" but was "broader than reasonably necessary" and thereby gave "the perception of official favoritism or endorsement of that religion." Pet. App. 29a. This standard was not urged below by the plaintiffs or any *amicus*. It engrafts a new hindsight test onto an already confused area of the law and adds to the uncertainties created by *Lemon*. It is unsupported by the language or purpose of the Establishment Clause, and it should not be sanctioned by this Court lest it add to the confusion that already inflicts this area of the law.

Nor is this analysis supported by *Larson v. Valente*, 456 U.S. 228 (1982), on which Judge Kaye relied (Pet. App. 22a-23a). *Larson* applied a "strict scrutiny" test to "statute[s] or practice[s] patently discriminatory on [their] face" (*Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984)), which this statute clearly is not.

Under Judge Kaye's test, any legislative accommodation for a particular religious practice would be constitutionally permissible only if a court, after the fact, could not imagine a narrower or more limited means of legislatively protecting the religious practice. Judge Kaye's rationale would jeopardize legislative accommodations for observances and beliefs of recognized religious groups. Some legislative exemptions go beyond the minimum "compelling governmental interest" that requires an exemption from a broad statutory rule. If Judge Kaye's "strict scrutiny" test is added to the standards that presently govern validity under the Establishment Clause, courts will be asked to invalidate every legislative accommodation for religion that goes beyond the bare minimum needed to keep religious observance from being infringed or inhibited. *See, e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334-39 (1987).

Finally, Judge Kaye is wrong as a matter of fact when she asserts that this law "presents at least the perception of official favoritism or endorsement of [the Satmar] religion" that would not be present if the law were more narrowly tailored. Pet. App. 29a. If the New York legislature had enacted a statute directing the Monroe-Woodbury School District to provide services for Kiryas Joel's disabled children at a "neutral site" in the Village of Kiryas Joel (as Judge Kaye suggested might be permissible in her opinion for the New York Court of Appeals in *Wieder* and concluded would have been permissible in her concurring opinion in this case), the perception of "official favoritism or endorsement" would be no less than when it created a public school district congruent with the Village of Kiryas Joel. An "objective observer" is unlikely to see any difference between these two forms of accommodation. Indeed, such a hypothetical statute would permit the education of the *same children* in the *same building* by the *same teachers* as is being provided under Chapter 748

— the *only* difference being the religious identification of the governing school board.

(6) *Composition of the school board* — Judges Smith and Simons also relied on their conclusion that "only members of the Hasidic sect will likely serve on the school board." Pet. App. 12a. It cannot be seriously argued, however, that the fact that the school board may reflect the religious and ethnic characteristics of the voters of the Village violates the Establishment Clause. If so, other legislative districts where Catholics, Mormons, or Jews predominate would be constitutionally suspect. Under the Equal Protection Clause, the same might be true of districts where white citizens reside in overwhelming numbers. The fact that elected representatives of a school district will, by and large, mirror their constituencies is not a reason to invalidate the district.

Indeed, the smaller a school district, the more responsive it is likely to be to the citizens within its jurisdiction. The New York State Division of the Budget, although opposing passage of the bill, acknowledged in its Budget Report that the legislation was "consistent with the State's policy of local control in educational matters" (J.A. 33). This policy was stated persuasively by the New York Court of Appeals in *Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27, 46, 453 N.Y.S.2d 643, 652 (1982), *appeal dismissed*, 459 U.S. 1138 (1983) (quoting the *amicus* brief of 85 public school districts):

"For all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens at the local level, acting as part of school district units containing people with a community of interest

and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools. Through the years, the people of this State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing and operation of those schools is generated by giving citizens direct and meaningful control over the schools that their children attend."

The creation of the Kiryas Joel Village School District furthered this policy of local control. That the district's "representatives" will mirror the citizens of the community is only natural and is, in fact, the essence of democratic government. The fact that Kiryas Joel's residents are all currently Satmar Hasidim and that they will, therefore, elect Satmar Hasidim to public office does not turn their official acts into governmental advancement of religion.

If the rule were otherwise — *i.e.*, if the law were to be struck down because the elected school board will consist of devout religious observers — it would conflict with *McDaniel v. Pary*, 435 U.S. 618 (1978). This Court held in *McDaniel v. Pary* that a state law disqualifying clergy from legislative office violated the Free Exercise Clause. The *McDaniel* Court's conclusion that "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts" (435 U.S. at 629) (footnote omitted) applies fully to individuals who are not even clergy but are devoutly religious laymen.

In fact, operation of the Kiryas Joel public school under the current school board has not been challenged in this purely facial attack on Chapter 748. The effect of the New York court's decision is to deprive the residents of Kiryas Joel of the right to self-governance simply because all adhere to the same faith. That is tantamount to imposing special disabilities on the basis of religious views or religious status. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990). "The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Pary*, 435 U.S. 618, 641 (Brennan, J., concurring).

D. Chapter 748 Does Not Foster Any Excessive Government Entanglement With Religion.

In the New York courts, only the trial judge found that Chapter 748 infringed the third "prong" of the *Lemon* test — *i.e.*, that it "fosters excessive entanglements with religion." Pet. App. 100a. He arrived at this conclusion because, he said, "the State Education Department must take special steps to monitor the newly created school district to ensure that public funds are not expended to further religious purposes." *Id.*

This Court rejected what it called this "Catch-22" argument in *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988), observing that the argument means that "the very supervision of the aid to assure that it does not further religion renders the statute invalid." *Id.* As was true in *Bowen v. Kendrick*, 487 U.S. at 616, this case does not involve aid to parochial schools. And there is, in these circumstances, no reason to fear that the monitoring will involve intrusion into the day-to-day operations of a religious organization. Indeed, the only "organization" to be monitored is a public school district, and

as such, its programs are subject to the same thorough review by state health and education officials that applies to other such districts. The application of this prong of the *Lemon* test is, therefore, controlled by the following observation in *Wolman v. Walter*, 433 U.S. 229, 248 (1977): "It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."

E. Chapter 748 Does Not "Endorse" Religion or a Particular Religious Practice.

We turn now to the gloss placed on the first two prongs of the *Lemon* test by Justice O'Connor in her concurring opinions in *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984), and *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985). The "endorsement" standard has been approved by other Justices in subsequent cases. See *Lee v. Weisman*, 112 S. Ct. 2649, 2665 & n.9 (1992) (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring); *id.* at 2671-72 (Souter, J., joined by Stevens and O'Connor, JJ., concurring) (collecting cases invalidating laws and practices "conveying a message of religious endorsement"); *Allegheny County v. ACLU*, 492 U.S. 573, 592-94 (1989); *id.* at 596-97 (opinion of Blackmun, J., joined by Stevens, J.) ("*Lynch* concurrence provides a sound analytical framework for evaluating governmental use of religious symbols"); *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (important concern of effects test is whether the symbolic union effected by a challenged governmental action will be perceived as an "endorsement" of religion); *Wallace v. Jaffree*, 472 U.S. 38, 56, 61 (1984) (invalidating statute under "purpose" portion of endorsement test).

The "endorsement" standard is violated when a statute "makes adherence to religion relevant to a person's standing in the political community" because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment), quoting *Lynch*, 465 U.S. at 688. The relevant questions under this refinement of the first two *Lemon* prongs are "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." 472 U.S. at 69.

With respect to the "purpose" inquiry, Justice O'Connor emphasized in *Wallace v. Jaffree* that "[e]ven if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or religious belief 'was and is the law's reason for existence.'" 472 U.S. at 75, quoting *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968). State legislatures rarely enact laws with such an improper purpose and this statute is plainly not one of the unusual exceptions.

Justice O'Connor described in *Wallace v. Jaffree*, 472 U.S. at 76, how the "effect" portion of the "endorsement" test is to be applied: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" In this case, an "objective observer" would be familiar with the litigation that led to the enactment of Chapter 748, and that familiarity would surely keep him or her from concluding that the law "endorses" the Satmar Hasidim or makes everyone who is a nonadherent to Satmar Hasidism an "outsider."

Following the stand-off between Monroe-Woodbury and the Satmar Hasidim in the state-court litigation, Chapter 748 did *not* simply enact the position of the Satmar Hasidim by directing, as Judge Kaye had suggested in *Wieder*, that Monroe-Woodbury provide the disabled children of Kiryas Joel with services at a "neutral site." It enacted a proposal that was urged by *both* Monroe-Woodbury and the Satmar Hasidim. Hence it is not likely that the legislative resolution would be viewed as capitulation to the demands of the Satmar Hasidim.

Moreover, the text of Chapter 748 is neutral, making no mention whatsoever of religion or religious beliefs. An "objective observer" acquainted with the legislative history of the statute would know that it was passed to break the impasse following the *Wieder* decision, to meet the emotional and secular educational needs of the children. He or she would not view the alleviation of those needs as an endorsement of the parents' religion, even if the children's needs bore some relation to that religion. And even if the legislation were viewed as an accommodation of religious beliefs, "a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement." *Allegheny County v. ACLU*, 492 U.S. 573, 632 (1989) (O'Connor, J., concurring). See also *Lee v. Weisman*, 112 S. Ct. 2649, 2677 (1992) (Souter, J., concurring) (governmental accommodations of religion, like those made every day by individuals, are properly perceived as "express[ions of] respect for, but not endorsement of, the fundamental values of others").

Finally, in deciding whether Chapter 748 had the effect of endorsing the Satmar faith, an "objective observer" would consider the implementation of the statute. Here, of course,

as detailed in the affidavit of the Kiryas Joel Village School District Superintendent (M.W. Pet. App. 114a-122a) and in the affidavit of the Monroe-Woodbury Director of Pupil Personnel Services (M.W. Pet. App. 110a-113a), and as must be presumed in a facial challenge, the statute has been implemented in an entirely secular fashion. One observing a classroom in the Kiryas Joel public school would see or hear nothing that would indicate any governmental "endorsement" of the Satmar Hasidic faith.

F. Chapter 748 Does Not "Coerce" Any Religious Observance.

While acknowledging that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage," Justice Kennedy's opinion in *Allegheny County v. ACLU*, 492 U.S. 573, 657 (1989), also recognized that government may not "coerce anyone to support or participate in any religion or its exercise" nor "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Lynch v. Donnelly*, 465 U.S., at 678." 492 U.S. at 659. See *Lee v. Weisman*, 112 S. Ct. 2649, 2655, 2659 (1992) (invalidating "state-sponsored and state-directed" prayer at secondary school graduation ceremonies because it "in effect required participation in a religious exercise" in violation of these central principles).

Chapter 748 is, in no conceivable fashion, coercive. It does not "place the government's weight behind an obvious effort to proselytize on behalf of a particular religion". 492 U.S. at 661. Creating a public school district that coincides with the Village inhabited by Satmar Hasidim is plainly not an effort — much less an "obvious" effort — to proselytize. No one will be pressured to become a Satmar

Hasid in order to send his child to the Kiryas Joel public school.

III.

CHAPTER 748 IS, AT MOST, A VALID ACCOMMODATION OF RELIGION

Chapter 748 has, at most, the effect of accommodating the needs of a community of devoutly religious people. The statute does no more than ameliorate a burden that results from the free exercise of religion. Without Chapter 748, a community that has chosen to live together to preserve its religious heritage and practices will be unable to educate its disabled children to live in the modern world. This Court has repeatedly approved of accommodations to religious observance as consistent with the Establishment Clause. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987) ("the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause") (footnote omitted); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions . . ."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (accommodation by the government of the religious beliefs of its citizens "follows the best of our traditions"); see also *Lee v. Weisman*, 112 S. Ct. 2649, 2677 (1992) (Souter, J., concurring) ("accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all"); *McDaniel v. Pary*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring) ("limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose

freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause").

Rather than viewing religious accommodation as a constitutional desideratum, Judge Smith's opinion treated it as a constitutional vice. It found that "the primary effect" of the "extensive effort to accommodate the desire to insulate the Satmar Hasidic students" necessarily amounted to a message of endorsement of religion. Pet. App. 15a. Consequently, it held that "the legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation." Pet. App. 16a.

There is, however, nothing constitutionally dubious in accommodating religion by granting secular respect to the fact that religion is extremely important to some people, and they should be accorded latitude in the private observance of their faith. That form of accommodation differs significantly from an accommodation that is made because government approves and endorses the particular religious faith. Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 Yale L.J. 1127, 1142-43 (1990). Even assuming, *arguendo*, that New York State enacted Chapter 748 to accommodate "separatist tenets" of the Satmar Hasidim, it is simply not credible to assert that the legislature and Governor Cuomo did so out of a desire to approve and endorse such tenets, as opposed to simple secular respect for those who observe them. Indeed, "where the state singles out small minority religions . . . for special accommodation, virtually nothing that it does for them would convey an endorsement of their religious positions." *Id.* at 1144 n.89.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court upheld the *right* of the Amish religious sect to be exempted from certain compulsory school-attendance laws

under the Free Exercise Clause based on its religious convictions and resistance to the values of modern society that parallel those of the Satmar community. The *Yoder* Court made clear that "[a]ccommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. . . . Such an accommodation, 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.'" 406 U.S. at 234-235, n.22 (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

The residents of Kiryas Joel do not claim that they have a constitutional right to their own school district under the Free Exercise Clause, but merely that the New York Legislature did not violate the Establishment Clause when it chose to create such a district. Chapter 748 is precisely the type of discretionary legislation this Court had in mind in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), when it advocated "leaving accommodation to the political process." The *Smith* Court expressed confidence that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.* See also McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 693 (1992) ("Because of the pluralist traditions of this country, legislators and executive officials frequently are willing to make [accommodations to minority religions] when the need is brought to their attention."). For example, the *Smith* Court pointed with approval to the number of States that have made an exception to their drug laws for sacramental peyote use. 494 U.S. at 890. See also *Lee v. Weisman*, 112 S. Ct. 2649, 2677 (1992) (Souter, J., concurring). The New York

Legislature was not acting unconstitutionally when it was similarly solicitous of the needs of another minority religious group.

IV.

IF NECESSARY, *LEMON V. KURTZMAN* SHOULD BE OVERRULED

We believe, for the reasons heretofore presented in this Brief, that there are ample reasons to sustain Chapter 748 under all the Establishment Clause tests that this Court has applied since announcing *Lemon v. Kurtzman*. But if the Court were to disagree with our arguments, and were to find that any of the "prongs" of *Lemon v. Kurtzman* are violated by Chapter 748, we urge the Court finally to overrule the *Lemon* test.

Justice Scalia noted last term in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2149-50 (1993), that a majority of the Justices have publicly expressed their disagreement with some or all of the *Lemon* test. Nonetheless, it has not been formally buried. Consequently, lower courts must continue to attempt to apply it to controversies that come before them. The results reached under the *Lemon* test are, however, widely inconsistent because the three articulated "prongs" actually provide little guidance to the lower courts. Rather than pointing a court in the direction of a correct result, *Lemon* provides a verbal formula that courts use to justify the results they reach on other true grounds. See Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 450 (1986) (*Lemon* test has been "so elastic in its application that it means everything and nothing"); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment*

and the Supreme Court, 24 Vill. L. Rev. 3, 20 (1978) (*Lemon* test does not "cover the plastic nature of the judgments in the area. Judicial discretion, rather than constitutional mandate, control the results."). An observation made by the Court almost a quarter of a century ago — before the *Lemon* test was first announced — seems even more true after two decades of applying *Lemon*: "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of [the Religion C]lauses that seemed clear in relation to the particular cases but have limited meaning as general principles." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

Experience has proved that the constitutional considerations governing various challenges made under the Establishment Clause cannot be subsumed within a single "test." Programs involving public funds paid to parochial schools or religious institutions raise constitutional policies that differ from laws designed to remove barriers that prevent religious minorities from fully exercising their religion.

The Court should, we submit, announce that the three-part *Lemon* test will no longer be viewed as controlling all Establishment Clause questions. The "evils" at which the Establishment Clause is directed — described in *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970), and invoked as the basis for the lines drawn in *Lemon* (403 U.S. at 612) — should again be at the forefront of First Amendment analysis. The State may not engage, under this formula, in "sponsorship, financial support, and active involvement . . . in religious activity."

We do not, in this case, quarrel with the result reached in *Lemon v. Kurtzman*, or ask the Court to overrule the holding of that case insofar as it prohibits payments to private

parochial schools for the salaries of certain teachers. And we do not believe that, in order to decide this case, the Court need resolve any questions relating to the permissible financing of private educational institutions, secular or sectarian.

The Court should, however, overrule *Lemon's* "secular purpose" and "primary effect" tests to the extent that they imply that a legislature may not enact laws that remove impediments to religious observers' equal access to secular governmental benefits. So long as no religious activity is being officially encouraged or funded, a State may, by law, accommodate the distinctive requirements and needs of religious observers.

We base this constitutional doctrine on the premise that the Religion Clauses of the First Amendment were designed to achieve a dual goal: to shield the observance of religion and to protect against state imposition of religion. There is, to be sure, vigorous debate among scholars as to whether the Establishment Clause or the Free Exercise Clause is the paramount provision of the First Amendment's first sixteen words. Compare, e.g., McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 687-88 (1992); Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990); and Tribe, *American Constitutional Law* § 14-8 at 1204 (2d ed. 1988) ("Whenever both religion clauses are potentially relevant, . . . the dominance of the free exercise clause follows from the principles underlying both clauses.") with Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555 (1991); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev.

673 (1980); and *Kurland, Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1 (1961). The Court has frequently observed that inconsistency inheres in the full logical application of both clauses. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring in the judgment); *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) ("either of [the two Religion Clauses], if expanded to a logical extreme, would tend to clash with the other").

It is possible, we submit, to reconcile the disparate objectives of the two Clauses whenever a law seeks to remove disabilities from a minority faith or otherwise bring to it secular benefits provided by law for those who comprise the majority. Such a law is patently not coercive because it has no direct effect on anyone who is not already an adherent of the faith. Nor does it result in the evils of "sponsorship, financial support, and active involvement . . . in religious activity" to which the Establishment Clause is directed.

It is, of course, true that legislation that accommodates religion must be even-handed — *i.e.*, it may not discriminate among different faiths. A law or governmental practice that selects a particular faith or belief for favorable treatment while refusing to grant the same benefits to other faiths similarly situated would violate the First Amendment (*Larson v. Valente*, 456 U.S. 228 (1982)).

But this case involves no unequal treatment. The disabled children of Satmar Hasidim presented a unique problem which the New York Legislature is constitutionally permitted to resolve — just as a legislature may resolve, in favor of the Native American Church, the right to ingest peyote during a religious ceremony. The fact that other communities of religious observers — who do not have the same conflict of conscience — are not given a public school

district of their own is no different from the fact that other religious observers are not given the same exemption from federal law that entitles members of the Native American Church to ingest peyote.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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